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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN BENTLEY,

NO. C 06-1952 CW (PR)

Petitioner,

ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS

v.

A.P. KANE, Warden;
JAMES DAVIS, Chairman,
Board of Parole Hearings,

Respondents.

Petitioner John Bentley,¹ proceeding pro se, has filed a petition for a writ of habeas corpus pursuant to title 28 U.S.C. § 2254, challenging as a violation of his constitutional rights the denial of parole by the California Board of Parole Hearings (Board).²

¹ When Petitioner filed his petition, his name on the caption was spelled as "Bently;" therefore, the Clerk of the Court used that spelling on the court file and the Court's ECF database. The record shows that the correct spelling of Petitioner's name is "Bentley," which is how Petitioner spells his name on the signature line of his petition and traverse. (Pet. at 7; Traverse at 12.) Accordingly, the Court directs the Clerk to correct the spelling of Petitioner's name to "Bentley."

² The Board of Prison Terms was abolished effective July 1, 2005, and replaced with the Board of Parole Hearings. Cal. Penal Code § 5075(a).

1 Respondents have filed an answer.³ Petitioner has filed a
2 traverse. Having considered all of the papers filed by the
3 parties, the Court DENIES the petition.

BACKGROUND

5 In November, 1990, a jury found Petitioner guilty of second
6 degree robbery and kidnapping to commit robbery.⁴ (Resp't Ex. 1,
7 Abstract of Judgment at 1.) The Los Angeles County Superior Court
8 sentenced him to life with the possibility of parole. (Resp't Ex.
9 3, Subsequent Parole Suitability Hearing Transcript at 1.)
10 Petitioner began serving his sentence on February 7, 1991, and his
11 minimum eligible parole date was September 10, 1997. (Id.)

12 At Petitioner's sixth parole suitability hearing on June 3,
13 2004, the Board considered the following information, derived from
14 the Los Angeles County Probation Officer's Report, about the
15 kidnaping and robbery:

16 The victim, who describes himself as being diabetic and
17 in need of food at the time of the alleged offenses, left
18 his business location at about 11:30 p.m. on October 20,
1990 en route to home with the intention of taking care
of his medical condition.

In proceeding to an automobile parked nearby, the victim

21 ³ The State claims that under Rule 2(a) of the Rules Governing
22 Habeas Corpus Cases Under Section § 2254, the proper respondent is
23 A.P. Kane, the warden at the Correctional Training Facility where
Petitioner is incarcerated. (Answer at note 1.) In its October
24 26, 2006 Order, the Court noted that it was the State's practice in
prisoner petitions challenging parole decisions to designate James
Davis, the Chairman of the Board of Parole Hearings as the proper
Respondent. Accordingly, the Court substituted him as Respondent.
25 The Court directs the Clerk of the Court to include Kane and Davis
as Respondents in this action.

⁴ In 1991, the California Court of Appeal stayed his sentence for second degree robbery. (Pet. at 3.)

1 reportedly was confronted with the armed defendant who
2 pointed a handgun at the victim's head and demanded the
3 keys to the victim's vehicle. Fearing for life and
4 safety, the victim complied by giving the keys to the
5 defendant who then ordered the victim to enter the
6 vehicle which defendant proceeded to drive away from the
7 location. The vehicle was subsequently driven to an upon
8 [sic] a freeway where it was stopped. With the handgun
pointed at the victim's head, the defendant proceeded to
demand the victim's wallet and money and, further fearing
for life and safety, the victim complied. At this point,
the victim was ordered to exit the vehicle which was
driven from the location leaving the victim along the
freeway. The victim then proceeded to a call box and
contacted police.

9 At about 10:59 p.m. on October 28, 1990, patrolling
10 police officers observed a parked vehicle in proximity to
closed businesses. Considering this to be suspicious,
11 police proceeded to investigate and determined a stolen
status for thef [sic] vehicle. Police then confronted an
occupant, identified as defendant asleep inside the
12 vehicle. Defendant was arrested and subsequently
identified himself with different names and dates of
13 birth. The vehicle was determined to be the property of
14 the victim. Defendant declined a statement to police but
made a spontaneous statement of only stealing a car and
not robbing anyone. The victim subsequently identified
15 the defendant as the assailant on October 20, 1990.

16 (Resp't Ex. 2, Probation Officer's Report at 2-3.)

17 Petitioner's disciplinary history consists of six rules
18 violation reports (CDC-115) and six disciplinary memos (CDC-128)
19 while incarcerated. (Id. at 27, 29.) He received his most recent
20 CDC-115 on October 6, 2002, for refusing to move. (Id. at 27.)
21 The remaining CDC-115s were for refusing to report to work,
22 engaging in mutual combat with a cellmate in 1996, failing to
23 report in 1993 and 1994, and possessing contraband (sandpaper) in
24 1993. (Id. at 28.) His six CDC-128s were for failing to report,
25 smoking, and having an unexcused absence. (Id. at 29.)

26 While incarcerated, Petitioner has participated in various
27 vocational courses. In 1997, he completed a vocational course in
28 dry cleaning. (Id. at 23.) He participated in, but did not

1 complete, three other vocational courses in air conditioning,
2 refrigeration and radiology, as well as welding and metal
3 fabrication. (Id. at 24.)

4 Petitioner earned his GED in 1994. (Id. at 23.) He worked in
5 the laundry prior to being assigned as a tutor, receiving average
6 work reports and a couple of laudatory chronos. (Id.) At the time
7 of his sixth parole suitability hearing, Petitioner was working as
8 a woodworker at the Prison Industry Authority (PIA), where he was
9 earning satisfactory work reports. (Id.) Since 1996, he has
10 continued to participate in Alcoholics Anonymous (AA). (Id. at
11 25.) He has also participated in Narcotics Anonymous (NA) and
12 various other self-help programs, including Reintegration Into
13 Society, Lifeplan for Recovery, Prison Fellowship, Anger
14 Management, and Creative Options. (Id. at 25-27.)

15 In addition to Petitioner's prison record, at his sixth parole
16 suitability hearing, the Board considered his prior criminal
17 record, social history, parole plan, files and prior transcripts,
18 as well as any new psychiatric reports. (Id. at 4-5.)

19 The Board reviewed Petitioner's personal background, noting
20 that he has an unstable social history that includes separation of
21 his parents when he was nine, followed by intermittent foster care.
22 (Id.) Petitioner smoked marijuana at age twelve and abused alcohol
23 at age fourteen. (Id.) He dropped out of high school in the
24 eleventh grade. (Id.) Also, as a teen, he became addicted to
25 cocaine and had an "approximately \$150.00 a day habit." (Id.)

26 Petitioner testified that if the Board granted parole he
27 intended to live with his mother, Marilyn Luce, in San Bernardino
28 County. (Id. at 32.) His stepfather, Mike Luce, wrote to the

1 Board to confirm that Petitioner was guaranteed a job with D and L
2 roofing company. (Id. at 34.) His brother also wrote a letter
3 asking the Board to grant Petitioner parole. (Id. at 35.)
4 Petitioner stated that he planned to attend AA and NA if released
5 on parole. (Id.) He also informed the Board that he had been
6 studying real estate for the past six or seven years, and that he
7 planned eventually to pursue a career in real estate. (Id. at 37.)

8 The Los Angeles County District Attorney's Office opposed
9 granting Petitioner parole. (Id. at 45-47.) The Deputy District
10 Attorney suggested that parole be denied because Petitioner had
11 "one of the worst social histories [the Deputy District Attorney]
12 has seen." (Id. at 45.) He pointed out that while Petitioner
13 attended AA, Petitioner still needed to overcome his addiction
14 problem:

15 . . . I would think that he, the inmate, could gain some
16 insight into learning the steps, if for no other reason
17 than because it is one expression -- It goes further than
18 just to listen to these individuals express their life
19 experiences. It's the steps that have encouraged these
20 individuals to express their life experiences and to tell
the listening audience how they cope with their stresses.
And I don't think this individual has learned anything in
terms of coping with stress or of doing things according
to the way they should be done. He in essence is going
to do it his own way, regardless.

21 (Id. at 48.)

22 The Board reviewed Petitioner's psychological report dated
23 November 8, 2002, which indicated that his violence potential
24 within a controlled institutional setting was "significantly below
25 average relative to the inmate population." (Id. at 29.) The
26 Board found the psychological report "inconclusive" because it did
27 not mention Petitioner's CDC-115 on October 6, 2002. (Id. at 55.)
28 The Board considered a more recent February 17, 2004 Correctional

1 Counselor's report that Petitioner posed "a high degree of threat
2 to the public." (Id. at 30-31.) The report concluded that
3 Petitioner's "unwillingness to follow the rules in the institution"
4 may reflect what he would do in the community. (Id.)

5 After a brief deliberation, the Board concluded that
6 Petitioner was "not suitable for parole and would pose an
7 unreasonable risk of danger to society or a threat to public safety
8 if released from prison." (Id. at 53.) The Board issued a one-
9 year denial of parole. (Id.) In support of its decision, the
10 Board cited the "dispassionate" and "especially cruel and callous
11 manner" in which the commitment offense was carried out. (Id.)
12 The Board also stated that Petitioner had an unstable social
13 history. (Id. at 55.) The Board stated that Petitioner had an
14 "escalating pattern of criminal conduct" and had "failed to profit
15 from society's previous attempts to correct his criminality,"
16 including juvenile probation, juvenile camp, adult probation and
17 county jail. (Id. at 54.) His juvenile record consists of three
18 burglary arrests, two runaways, and a vehicle theft. (Id.) As an
19 adult, Petitioner was convicted of burglary and four counts of
20 forgery before the commitment offense. (Id.) Finally, the Board
21 noted that Petitioner's parole plans were "okay." (Id.)

22 The Board, while acknowledging Petitioner's participation in
23 AA since 1996, noted its concern that he was "just going through
24 the motions" and not gaining the necessary insight. (Id. at 57.)
25 The Board recommended that Petitioner participate in self-help and
26 substance abuse programs "to discuss, understand, and cope with
27 stress in a non-destructive manner." (Id. at 55.) The Board felt
28 that "[u]ntil progress is made, the prisoner continues to be

1 unpredictable and a threat to others." (Id.) The Board concluded
2 by commending Petitioner on his above average work reports in the
3 PIA furniture factory, on receiving his GED, and on his
4 participation in self-help programs. (Id. at 55-56.) However, the
5 Board found that these positive aspects did not outweigh the
6 unsuitability factors. (Id. at 56.) The Board encouraged
7 Petitioner to "remain disciplinary free, continue to participate in
8 self-help and substance abuse programs, and cooperate with
9 clinicians in the completion of a new clinical evaluation for the
10 next hearing." (Id.)

11 Petitioner filed a petition for a writ of habeas corpus with
12 the Los Angeles County Superior Court challenging the Board's
13 decision. On October 27, 2004, the superior court denied the
14 petition, finding that "the record contains 'some evidence' to
15 support the Board's finding that Petitioner is unsuitable for
16 parole," based on his unstable social history and his participation
17 in "serious misconduct while incarcerated, most recently in 2002."
18 (Resp't Ex. 4 at 1.) The court also found inconclusive the
19 November, 2002 psychological report where the evaluator concluded
20 that Petitioner would pose no greater risk in the community than
21 the average citizen. (Id. at 2.) The court found that it was not
22 clear if the evaluator fully considered Petitioner's disciplinary
23 record since incarceration, including his most recent disciplinary
24 violation. (Id.) The court rejected the Board's conclusions that
25 Petitioner was unsuitable for parole based upon the circumstances
26 of the commitment offense and his past criminal history, stating:

27 There is no evidence in the record that the commitment
28 offense was "especially heinous, atrocious, or cruel in
manner." (Cal. Code Regs., tit. 15, §2402(c)(1).)

Further, while the record reflects Petitioner did have a criminal record prior to the commitment offense, there is no evidence that Petitioner had previously "inflicted or attempted to inflict serious injury on a victim." (Cal. Code Regs., tit. 15, §2402(c)(2).)

4 | (Id.)

5 After the California Court of Appeal and California Supreme
6 Court issued summary denials, Petitioner brought this federal
7 habeas petition.

LEGAL STANDARD

Because this case involves a federal habeas corpus challenge to a state parole eligibility decision, the applicable standard is contained in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). McQuillion v. Duncan, 306 F.3d 895, 901 (9th Cir. 2002).

Under AEDPA, a district court may not grant habeas relief unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); Williams v. Taylor, 529 U.S. 362, 412 (2000). A federal court must presume the correctness of the state court's factual findings. 28 U.S.C. § 2254(e)(1).

24 Respondents concede that Petitioner has exhausted his state
25 remedies by filing the petition for a writ of habeas corpus in the
26 California Supreme Court. Where, as here, the highest state court
27 to reach the merits issued a summary opinion which does not
28 explain the rationale of its decision, federal court review under

1 § 2254(d) is of the last state court opinion to reach the merits.
2 Bains v. Cambra, 204 F.3d 964, 970-71, 973-78 (9th Cir. 2000). In
3 this case, the last state court opinion to address the merits of
4 Petitioner's claim is the opinion of the Los Angeles County
5 Superior Court.

DISCUSSION

7 || I. Jurisdiction

8 Respondents argue that the Court does not have subject matter
9 jurisdiction on the grounds that denial of state parole does not
10 affect a liberty interest protected by the United States
11 Constitution. However, the Ninth Circuit has rejected the
12 contention that California prisoners have no liberty interest in
13 parole and thus have no federal due process rights in connection
14 with parole eligibility. Sass v. California Bd. of Prison Terms,
15 461 F.3d 1123, 1128 (9th Cir. 2006). Therefore, the Court has
16 subject matter jurisdiction under 28 U.S.C. § 2254 to decide
17 whether Petitioner's Fourteenth Amendment right to due process was
18 violated by the Board's determination that he was not suitable for
19 parole.

20 || II. Due Process Claim

21 Petitioner asserts that his due process rights were violated
22 by the Board's decision to deny parole because that decision was
23 not supported by "some evidence." (Pet. at 2.) Petitioner's
24 claim fails.

Because California prisoners have a constitutionally protected liberty interest in release on parole, they cannot be denied a parole date without the procedural protections necessary to satisfy due process. *McQuillion*, 306 F.3d at 902. A parole

1 board's decision must be supported by "some evidence" to satisfy
2 the requirements of due process. Superintendent v. Hill, 472 U.S.
3 445, 455 (1985); McQuillion, 306 F.3d at 904; Morales v.
4 California Dep't of Corrections, 16 F.3d 1001, 1005 (9th Cir.
5 1994), rev'd on other grounds, 514 U.S. 499 (1995). The evidence
6 underlying the board's decision must have some indicia of
7 reliability. McQuillion, 306 F.3d at 904; Jancsek v. Oregon Bd.
8 of Parole, 833 F.2d 1389, 1390 (9th Cir. 1987).

9 In denying Petitioner's request for parole, the Board first
10 cited as evidence the especially cruel, callous and dispassionate
11 nature of the commitment offense by stating:

12 . . . the victim Alan Wong was locked into his
13 automobile when the prisoner Bentley approached him with
14 a handgun pointed at his head and demanded the keys to
15 the vehicle. The victim gave the prisoner the keys
16 because he was in fear of his life and safety. The
17 prisoner also demanded that the victim get into the
18 vehicle with him. They drove off together. They drove
down the freeway for a distance, at which time the
prisoner stopped on the freeway and asked the victim for
his wallet and money. He took the money, then told the
victim to get out of the vehicle, and the prisoner drove
off with the victim's vehicle. He was arrested in the
vehicle approximately eight days later. The victim was
not physically injured during the robbery.

19 (Resp't Ex. 3 at 53-54.)

20 As mentioned above, the Board cited as evidence Petitioner's
21 escalating pattern of criminal conduct, psychological assessment,
22 and most recent CDC-115 on October 6, 2002. (Id. at 54-55.) The
23 Board also cited Petitioner's unstable social history and need for
24 more self-therapy before release. (Id. at 54.) Petitioner
25 completed various vocational programs and participated in personal
26 self-help as well as substance abuse programming. (Id.) However,
27 the Board noted that the positive aspects of Petitioner's profile
28

1 did not outweigh the unsuitability factors. (Id. at 56.)

2 Petitioner argues that the Board's finding that the nature of
3 his offense outweighed the positive aspects of his profile was not
4 supported by the evidence. He relies on Biggs v. Terhune, 334
5 F.3d 910, 915-16 (9th Cir. 2003).

6 In Biggs, the Ninth Circuit found that parole denial based
7 solely on the gravity of the commitment offense can initially
8 satisfy due process requirements, and that the "some evidence"
9 standard could be satisfied by the Board's consideration of the
10 gravity of the offense. However, in dicta, the Biggs court held
11 that courts may also consider the parole board's decision-making
12 process over time: "The Parole Board's decision is one of
13 'equity' and requires a careful balancing and assessment of the
14 factors considered A continued reliance in the future on
15 an unchanging factor . . . runs contrary to the rehabilitative
16 goals espoused by the prison system and could result in a due
17 process violation." Biggs, 334 F.3d at 916-17.

18 The Ninth Circuit has not specified the number of denials or
19 the length of time served beyond the minimum sentence that would
20 constitute a due process violation. Petitioner had been denied
21 parole by the Board five times; this was his sixth parole
22 suitability hearing. In Iron v. Carey, the Eastern District of
23 California court granted a habeas petition challenging the Board's
24 denial of parole after a similar number of parole hearings where
25 the petitioner had served sixteen years of a seventeen years to
26 life sentence for second degree murder with a two-year enhancement
27 for use of firearm where all factors indicated suitability for
28 parole; however, the Ninth Circuit reversed. 358 F. Supp. 2d 936,

1 947 (E.D. Cal. 2005), rev'd, 505 F.3d 846 (9th Cir. 2007) (given
2 the egregiousness of the commitment offense, due process not
3 violated when Board deemed petitioner unsuitable for parole prior
4 to expiration of his minimum term). In another case, the Eastern
5 District court granted a habeas petition, finding a due process
6 violation in the denial of parole at the petitioner's twelfth
7 parole suitability hearing after he had served twenty-four years
8 of a sentence of life with the possibility of parole for first
9 degree murder where all factors indicated suitability for parole.
10 See Johnson v. Finn, 2006 WL 195159, *12 (E.D. Cal. 2006); appeal
11 docketed, No. 06-17042 (9th Cir. Oct. 30, 2006). The Ninth
12 Circuit has recently reversed a district court's habeas denial,
13 upon finding a due process violation based on the governor's
14 reliance on the "unchanging factor" of the gravity of the
15 commitment offense to reverse the Board's grant of parole. See
16 Hayward v. Marshall, 512 F.3d 536, 547 (9th Cir. 2008). The Board
17 had granted parole at the petitioner's eleventh parole suitability
18 hearing after he had served twenty-seven years of a fifteen years
19 to life sentence for second degree murder. Id. The Ninth Circuit
20 found that the governor's reversal of the Board's decision was not
21 supported by any evidence that the petitioner's release would
22 threaten public safety. Id.

23 The Board here relied on more than the "unchanging factor" of
24 Petitioner's commitment offense and criminal history in denying
25 him parole. Although the "cruel and callous" nature of
26 Petitioner's commitment offense and his criminal history weighed
27 heavily in the Board's determination, his unstable social history,
28 his prison disciplinary history, his abuse of alcohol and illegal

1 drugs, as well as the district attorney's opposition also
2 counseled against parole. (Resp't Ex. 3 at 53-59.) The Board's
3 conclusion that Petitioner needed more exposure to self-help and
4 substance abuse programs to understand and cope with stress
5 contributes to "some evidence" for denying him parole. (Id. at
6 55.)

7 The Los Angeles County Superior Court concluded that the
8 record contained "some evidence" to support the Board's finding
9 that Petitioner is unsuitable for parole. (Resp't Ex. 4 at 1.)
10 The California state courts' denial of Petitioner's claim was not
11 contrary to, or an unreasonable application of, controlling
12 federal law, nor based on an unreasonable determination of facts.
13 See 28 U.S.C. § 2254(d). Accordingly, Petitioner is not entitled
14 to relief, and his due process claim is DENIED.

15 The Ninth Circuit's evolving guidance in Biggs, Sass, Irons,
16 and Hayward suggests that the Board can continue to evaluate
17 static factors, including the nature of the commitment offense and
18 pre-conviction criminality, in deciding whether to grant parole.
19 See Sass, 461 F.3d at 1129. The weight to be attributed to those
20 immutable events, however, should decrease as a predictor of
21 future dangerousness as the years pass and the prisoner
22 demonstrates favorable behavior. See Biggs, 334 F.3d at 916-17;
23 Irons, 505 F.3d at 851. Should Petitioner continue to follow the
24 Board's advice by attending self-help programming and maintaining
25 a positive disciplinary record, continued parole denials based on
26 Petitioner's commitment offense alone could eventually give rise
27 to a due process violation. See Biggs, 334 F.3d at 916-17;
28 Hayward, 512 F.3d at 547.

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CONCLUSION

For the foregoing reasons, the petition for a writ of habeas corpus is DENIED. The Clerk of the Court shall enter judgment and close the file.

IT IS SO ORDERED.

Dated: 3/13/08

Claudia wilken

CLAUDIA WILKEN
United States District Judge

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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

JOHN BENTLY, Case Number: CV06-01952 CW
Plaintiff,
CERTIFICATE OF SERVICE
v.
A.P.KANE et al,
Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on March 13, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

John Bently E-83807
ED-176U
P.O. Box 689
Soledad, CA 93960-0689

Patricia Webber Heim
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

Dated: March 13, 2008

Richard W. Wieking, Clerk
By: Sheilah Cahill, Deputy Clerk